UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAR 14 1969

No. 22680 -A-

JOHN C. WAGNER, ROBERT L. WAGNER, PETER C. UNGER, Appellants v. UNITED STATES OF AMERICA Appellee	Appeal from the United States District Court of Oregon, Portland, Oregon Honorable ROBERT C. BELLONI Judge Presiding

REPLY BRIEF FOR APPELLANT PETER C. UNGER

JOSEPH E. O'CONNOR
Attorney for Appellant

FILED
MAR 12 1969
WM. B. LUCK, CLERK

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

II. REPLY TO COUNTER STATEMENT OF THE CASE

Appellee's statement of the case contains the following misstatements, among others:

1. The Paonessa Tract: Appellees state that such property was acquired by Unger and John Wagner (7). The property was purchased by Wagner only. There is no evidence whatsoever that Unger ever owned any interest in the land, until he purchased from Wagner various parcels, as did several other persons who were not even defendants in the case.

2. Rupard Tract: This land was acquired by Wagner, not Unger and Wagner. Unger acted as Wagner's agent in the purchase, and over a year later Unger purchased portions of this land. That John Wagner carried his interests at an inflated value on his balance sheet has nothing whatsoever to do with Unger.

3. Evans Tract: Unger again acted as agent for John Wagner in the purchase of this property, which Wagner then split up into parcels and sold such to Unger, D. D. Vance, and Peter Crystall. Wagner later represented that payments were being made on the trust deeds created by the aforementioned persons, but such persons had no knowledge or control of Wagner and his representations concerning the trust deeds. Further, D. D. Vance and Peter Crystall were not indicted, just Unger.

4. Lishner Properties: In November 1964, John Wagner purchased a house. In February 1965, Peter Unger purchased three properties from Lishner, in a completely separate transaction. The fact that all of the properties were later foreclosed upon does not

make a conspiracy out of the acts of Unger and those of John Wagner.

5. At page 12 of Appellees Brief, it is stated that Wagner and Unger, with their inventory of worthless promissory notes and trust deeds and their false financial statements, acted together. Peter Unger was the obligor on some trust deeds held by Wagner, but not the owner, so they were hardly part of any Unger "inventory". Further, if John Wagner repeatedly used false financial statements in his dealings, there is no evidence whatsoever of any ;use of such by Unger.

6. Harris Properties: No trust deeds executed by Unger were involved.

7. Shorts & Smith Properties: Again Appellee's allege property was purchased from a portfolio of worthless Elsinore trust deeds owned by John Wagner and Peter Unger. There is no evidence whatsoever that Unger owned any of the Elsinore trust deeds.

8. Ruby View Trailer Estates: The government states that this property was acquired by ;Unger and Wagner. The facts show that Unger acted only as an agent for Wagner in the purchase and that later, as part of his commission, received trust deeds and notes on certain lots. The property was owned by Wagner who sold it to Golden Rule and then listed it at high values on Golden Rule's financial statements. There was no evidence whatsoever that Unger ever had anything to do with Golden Rule. What happened to the property after Wagner purchased it was not his concern.

9. Rupard Tract Revisited: Again the government classified the property as "acquired by John Wagner. What John Wagner

did with Stewart and Golden Rule as to the trust deeds created on the property in no way concerned Unger, nor did he have anything to do with same.

10. Lulling Activities: The Appellee's statement that Unger was unaware that Brown held his trust deeds is precisely correct and this fact belies the entire theory of the government's case, to wit, that Unger acted in concert with the other defendants in negotiating in a fraudulent manner, trust deeds that he was an obligor on.

III. REPLY TO POINT ONE - THE EVIDENCE DID NOT SUPPORT THE JURY VERDICT

Peter Unger did nothing that was necessary for the accomplishment of the purportedly illegal schemes of John Wagner and his confederates, nor was it clearly demonstrated by the evidence that he had knowledge of the alleged illegal activities. Purchase of property from John Wagner by Peter Unger and the executing of purchase money mortgages against the parcels purchased were completely legal transactions and were not void. Whether or not there was a cash down payment does not control the genuineness of these transactions, since John Wagner could have traded the lots directly instead of trading the trust deeds or he could have signed anyone's name to trust deeds. Peter Unger's signing the trust deeds was an irrelevant and unnecessary act in the consummation of any fraud against property owners who traded for these trust deeds. Peter Unger was in no way connected with the three corporations, other than on several occasions acting as a broker for GRR. There is no evidence he had knowledge of what was told to any of the purported victims with respect to the value of the trust deeds. The statement that GRR had multi-million dollar assets alluded to by the Appellee was a true statement, as the evidence at the trial amply indicates.

Peter Unger did not profit from the purported illegal transactions. The Lishner house had nothing to do with the charges. The Harris trust deed sold by Unger had nothing to do with a purported fraud of Harris. This trust deed was created by Wagner and was an arms length transaction between Unger and Wagner and took place after the

occurence of any purported wrongdoing.

The Aloha property had been purchased by Unger at the time he collected any rents. The record is clear that Unger had no direct dealings with the Principals of the Aloha property nor was his acquisition of same anything other than an arms length transaction. It is also clear that he was taken advantage of and mislead in this transaction by John Wagner.

The argument that Unger misappropriated funds from Aloha Estates is totally without foundation, since Unger was the owner and President of the corporation during the time he handled any money.

IV. REPLY TO POINT THREE - JOINDER OF OFFENCES AND OF DEFENDANTS WAS IMPROPER

Where multiple defendants are involved Rule 8 (b) requires that each count of the indictment arise out of the same series of acts or transactions which all of the defendants have participated. WILLIAMSON v. UNITED STATES, (CA 9th 1962) 310 F2d 192 Joinder of defendants in violation of Rule 8 (b) is reversible error regardless of any prejudice shown to the defendant. UNITED STATES v. SPECTOR (CA 7th, 1963) 326 F2d 345 It was the Appellee's theory that two separate and distinct illegal agreements had been reached and overt acts were taken in respect to each agreement so that two conspiracies existed. The trial court refused to eliminate one conspiracy charged and instructed the jury that to convict under Count 14 it must "find a conspiracy complete and separate from that charged in the first count." The jury so found. It is entirely inconsistent to hold that the two conspiracies were complete and separate and to also hold that the conspiracies constituted a "series of acts or transactions constituting an offense or offenses."

The substantive offenses charged against the other defendants in counts XV, XVI, and XVII are even less related to Count I and no participation by Unger in these transactions is anywhere alleged in the indictment nor was there any proof that he in any way participated in these transactions, the joinder was error per se.

In the case of HAGGARD v. UNITED STATES (CA 8th, 1966) 369 F2d 968 cited by the Appellant there was only one conspiracy charged and all 13 substantive counts were embraced within the one conspriacy, each substantive offense apparently being cited as an overt act

of the alleged conspiracy. Also the appellant in that case was named in some of the substantive counts. All counts involved a similar scheme to defraud the same bank, there were identical transactions in each instance and the defendants were alleged to have aided and abetted the principal wrongdoer. This case is clearly distinguishable from the instant case, in that there is an apparent series of acts that are identical against the same victim by the same principal actor who was aided and abetted by the other defendants. The fact that the single conspiracy charge embraced all of the substantive charges alleged in the other counts of the indictment would make all counts part of the same transaction. The situation in the instant case is not at all similar since the conspiracy charge that Unger was indicted under did not embrace all of the counts of the indictment nor were all of the counts part of the same series or transaction.

Joinder was also improper under Rule 14 of the Federal Rules of Criminal Procedure. The case of DREW v. UNITED STATES, 331 F2d 85 (CA DC, 1964) is in point since distinct and separate offenses were joined, in particular, Counts XIV, XV, XVI and XVII. Further, distinct conspiracies were included in Count I which the evidence showed were clearly not a part of any common scheme that Unger entered into.

V REPLY TO POINT SIX - APPELLANT PETER UNGER WAS DENIED DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL

Objection is made to the introduction of the affidavit of Attorney TOM P. PRICE in that it was not part of the trial proceedings nor was the evidence contained therein considered in the trial court. If this affidavit is to be used, it points out that he prosecuted over 130 major felonies during his tenure in the District Attorney's office. However, there is no indication that he had any experience in either prosecuting or defending conspiracy cases, or for that matter, any complex business fraud case. Acting as defense counsel fo r this complex case, with its many counts, defendants and issues as well as its extremely complex business transactions is not comparable to the prosecution of the usual felony case. At any rate, the essential question is whether or not Peter Unger got effective representation at his trial, not whether or not his attorney was capable of giving adequate representation had he prepared for the case. It is well established that the right to counsel means the right to effective counsel. MAC KENNA v. ELLIS, C. A. Tex. 280 F. 2d 592; BRUBAKER v. DICKSON, 310 F. 2d 30, 37 (C. A. 9, 1962)

Appellee's brief alleges error in Appellant citing page 2664 to indicate Attorney Price's remarks on making a motion for a directed verdict. The error is regretted, for the remarks and motion were made on pages 2271-72 and page 2664 was merely a renewal of said motion.

Appellant contends that the representation was a farce throughout the trial and that the attorney highlighted the farce in his direct examination of his client, the Appellant, Peter C. Unger. Peter

Unger took the stand to testify in his own behalf. Most significant, is that he was the only witness to testify in his behalf so such was crucial to his defense. At the conclusion of the direct examination, Attorney Price asked his client if he hadn't been charged with the crime in Count 14, of Conspiracy to Defraud the United States Government (R.T. 2362). The prosecuting attorney had to interrupt Price's examination of his own client to tell Price that his client had not been charged with that Count and that crime, but with another Count, another crime (R.T. 2362) Attorney Price admitted at page 2363 of the Transcript that he was confusing Count 1 with Count 14.

Here a person's own attorney, after ten (10) days of trial, is still so confused that he doesn't know which crime is charged against his client. This error, coming right at the end of the direct examination, at the climax of Unger's testimony, underscores the serious damage and confusion that must have been left in the minds of the jurors. It was embarrassing and highly prejudicial to Unger who, as his own witness was testifying in an attempt to aid his cause, not defeat it. Further, Attorney Price asked not a single question on re-direct nor made any effort to reduce the prejudicial effect his error, ineptness and confusion must have created. The attorney's action made a farce of the direct examination, and of the entire trial, and was not the reasonably effective counsel that a defendant is entitled to under Due Process of Law

VI. REPLY TO POINT SEVEN - THERE WAS ERROR IN THE PROCEDURES FOLLOWED BY THE COURT IN DEALING WITH THE PUBLICITY ASPECTS OF THE TRIAL

Appellee apparently bases its argument on the following points:

1. Whatever newspaper publicity that did arise during the trial consisted of only three routine news articles appearing on inside pages and containing factual accounts of what had transpired at trial (Appellees brief p. 93).

2. That the trial court frequently and forcefully admonished the jury to void exposure to any newspaper, radio or television publicity about the case (Appellee's brief p. 92 and 99).

3. That the trial judge's examination of the jurors after prejudicial publicity had been published in the newspapers was adequate. (Appellee's Brief p. 94)

Concerning point three, the trial court had a duty to make an individual examination of each juror, either in open court or out of the presence of the other jurors, to determine whether or not they had been exposed to prejudicial publicity. The trial court did neither, and made but a weak inquiry of the jurors as a whole. CALO v. UNITED STATES, 338 F.2d 793, 795 (1st Cir. 1964) held that once a newspaper article has been brought to the attention of the court, the government has the burden to establish that no juror had the matter brought to his attention, which was not done in this case.

Concerning the second point, Appellee apparently acknowledges by omission that the trial court did not give a single admonition at any of the lunch breaks to the jurors, and this was a three

week trial. Further, as the transcript indicates, what few admonitions given were short, perfunctory, kind of a last toss-out phrase at the end of the day and neither strongly nor forcefully given. The trial court did not discharge its duty to give frequent admonitions during the trial.

As to point 1., the brief of Appellee constantly refers to the minimal amount of publicity that surrounded the case, and the few inside newspaper articles that did occur. The appendix of Appellant John Wagner's Brief shows conclusively that this trial made the headlines the front pages of the Portland newspapers, not onee, but several times, and that volumnious articles were written concerning the trial. There was a newspaper reporter present in the courtroom each day of the trial. This was no "little" case, but one of the most sensational fraud cases ever to hit the Portland area, and the application of the prejudicial aspects of newspaper publicity reaching the jurors is as applicable here as in COPPEDGE, ACCARDO, ESTES, SHEPPARD AND SILVERTHORNE

VII. REPLY TO POINT EIGHT - STATEMENTS OF APPELLANT PETER C. UNGER WERE IMPROPERLY ADMITTED.

Objection is made to the consideration by this court of F.B.I. memorandums that were not part of the testimony and were in no way introduced into evidence. If these memorandums are considered, it is noted that in the interviews on May 17, 1966 and June 1, 1966, Unger was not told that if he could not afford an attorney the court would appoint him one, and that his attorney could be present when he was being questioned, northat he could stop answering questions once he started to answer them. There was also no explicit warning that he could remain silent.

VIII. REPLY TO POINT TEN - MULTIPLE CONSPIRACIES WERE ALLEGED IN COUNT I.

The Appellee's position that there was a single over - all conspiracy to defraud property owners is a vast oversimplification of this case. Even if this were the original agreement reached between Unger and J. Wagner, it is incredible to hold that this same initial agreement applied to the other defendants who joined with J. Wagner at much later times or to hold that the use of unsecured GRR notes and the utilization of complex financial statements as well as loan brokers were not in fact new agreements entered into.

IX. CONCLUSION

The conviction of Peter C. Unger should be reversed under each of the arguments presented in the brief and partially amplified in the reply Brief. Alternatively, a new trial should be ordered.

Respectfully submitted,

JOSEPH E. O'CONNOR
Attorney for Appellant,
Peter C. Unger

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH E. O'CONNOR
Attorney for Appellant-
Defendant, PETER C. UNGER

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Reply Brief for Appellant Peter C. Unger were furnished by mail to Sidney I. Lezak, United States Attorney, U. S. Court House, Portland, Oregon 97204, this 10th day of March, 1969.

JOSEPH E. O'CONNOR
Attorney for Appellant,
Peter C. Unger